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October 15, 2010

David Radabaugh, Shoreline Planner
Washington Department of Ecology
3190 160th Avenue SE
Bellevue, WA 98008-5452

RE: Tukwila Shoreline Master Program Update

Dear Mr. Radabaugh,

We represent Innkeepers USA, the owner through its subsidiary, Grand Prix Tukwila LLC, of the Residence Inn hotel property located at 16201 West Valley Highway in the City of Tukwila. We are writing to provide comments on the Shoreline Master Program Update ("SMP Update") under review by the Department of Ecology.

The Tukwila Residence Inn by Marriott is located on an approximately 8.15-acre property along the east side of the Green River immediately north of Strander Boulevard. It was developed in the 1980's under existing City SMP provisions. The Residence Inn consists of 144 newly renovated extended stay suites in 18 two-story buildings along the narrow riverfront property. It is the only extended stay hotel in the City of Tukwila.

The Residence Inn property is designated Urban Conservancy in the SMP Update. Its underlying zoning is Tukwila Urban Center. As is evident from the attached aerial photograph, nearly the entire Residence Inn property and hotel development is within the City's shoreline jurisdiction and will be subject to and substantially affected by the SMP Update.

Innkeepers is concerned about the devastating impact that provisions in the SMP Update would have on the Residence Inn property —in particular, the provisions that substantially increase buffer widths for commercial and industrial properties on non-leveed shorelines without adequate justification or need and that impose disproportionate landscaping and public access requirements on minor development and redevelopment. These provisions are inconsistent with the Shoreline Management Act and Department of Ecology (DOE) Master Program Guidelines, and do not comply with constitutional and statutory limitations on the regulation of private property. They are addressed in more detail below by relevant subject matter.

River Buffers for Non-Leveed, Developed Commercial/Industrial Properties

Of particular concern to Innkeepers is the increase in the buffer on the Residence Inn property from 40 feet to 100 feet. *See* SMP Update at 7.7(B), 7.8(C); TMC 18.44.050-.060 (Ordinance No. 2271). The increased buffer cuts through the middle of the existing hotel development, placing half of the buildings inside the buffer. Consequently, it would cause the current uses and improvements on the property to become nonconforming and make it virtually impossible to redevelop the existing hotel property to its current use or to any other commercially viable use currently allowed by the underlying zoning on the property.

The only justification in the SMP Update for the 100-foot buffer on non-leveed commercial/industrial shorelines is the need to allow enough room to configure the river bank to achieve a slope of 2.5:1, which is the Army Corps of Engineers' slope profile for construction and repair of levees. SMP Update at 7.7(C). The buffer width is thus based on the Army Corps of Engineers' levee profiles for construction and repair of levees. It has nothing to do with the need to protect shoreline ecological functions or to ensure no net loss of such functions. Nor is it even needed to achieve bank stability, as the SMP Update states, since there no evidence that a 100-foot buffer will result in a more stable slope on a non-leveed commercial property like Innkeeper's than the existing, vegetated 40-foot buffer it will replace. Instead, if anything, it is little more than a faintly disguised attempt by the City to compel Innkeepers to set aside land for future flood control structures and projects without the City having to purchase an easement or other property right for such use of privately-owned land for these purposes.

This purpose is even more evident from the buffer reduction provisions in SMP Update §7.7(C) and TMP 18.44.050(D)(1), which only allow the 100-foot buffer to be reduced by up to 50% if the property owner reslopes the bank to a 2.5:1 slope, provides a 20-foot setback from the top of the new slope, vegetates both the river bank and the 20-foot setback area in accordance with the vegetation and landscape requirements in the SMP, and demonstrates to the satisfaction of the Director that the buffer reduction will not result in direct, indirect or long-term adverse impacts to shoreline ecosystem functions. Requiring a property owner to reslope the bank to a slope profile for construction and repair of levees in order to obtain a buffer reduction is unreasonable and warranted, both because it is cost-prohibitive and also not reasonably necessary to mitigate the shoreline impacts of proposed development. If anything, it underscores the true rationale for the 100-foot buffer on non-leveed commercial/industrial properties in the Urban Conservancy and High Intensity Environments, which is to require private property owners to bear the entire burden and cost of resloping the bank for flood control purposes, not to protect shoreline functions and values as required by the Shoreline Management Act and DOE Master Program Guidelines.

Imposition of a 100-foot buffer for these purposes is inconsistent with the Shoreline Management Act and DOE Master Program Guidelines. A 100-foot buffer is not needed to protect shoreline ecological functions or achieve no net loss of such functions under WAC 173-26-201(2)(c). Instead, the buffer size goes beyond that and attempts to achieve restoration of shoreline functions, which is not a permissible purpose for shoreline regulations under the Shoreline Management Act. Even more so, it would unfairly allocate the burden of providing flood control measures and improvements on private property owners, thereby infringing on private property rights. The 100-foot buffer is thus inconsistent with WAC 173 WAC 173-26-176(3)(c) and (h), WAC 173-26-186(5), WAC 173-26-186(8)(b)(i), WAC 173-26-191(1)(e), WAC 173-26-201(2)(c) and (3), and 173-26-211(3). It would also could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wn.2d 740, 761, 49 P.3d 867 (2002) ("development conditions must be tied to a *specific, identified impact* of a development on the community."); RCW 82.02.020 (Exaction is unlawful tax or fee unless City meets burden of establishing that development conditions are reasonably necessary as a direct result of the proposed development); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App. 649, 187 P.3d 786 (2008) (King County's clearing limits in critical areas ordinance violate RCW 82.02.020 because not proportionally related to proposed development); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987) (City must show "essential nexus" between required condition and impact of development); *Dolan v. City of Tigard*, 512 U.S. 374, 386-94, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (City must make individualized determination the required condition is "roughly proportional" to the impacts of the proposed development).

In contrast, a 50-foot buffer on non-leveed shoreline and industrial properties is more than sufficient to protect shoreline ecological functions and ensure no net loss of shoreline functions, consistent with the purposes of the Urban Conservancy Environment, SMP Update § 7.7 (B), and the policies of the Shoreline Management Act, RCW 90.58.020 and DOE Master Program Guidelines, WAC 173-26-186(8), -.201(2)(C). Like the buffers imposed for the similarly situated, non-leveed residential properties designated Residential Environment along the river, a 50-foot buffer is more than sufficient to ensure no net loss of shoreline functions and values and should be the minimum buffer imposed on non-leveed properties like Innkeeper's in the Urban Conservancy Environment.

In fact, the rationale for the 50-foot buffer for non-leveed residential properties in the Residential Environment is the same as the rationale for non-leveed commercial/industrial properties in the Urban Conservancy Environment: both are intended to be of sufficient width to achieve a 2.5:1 slope plus 20 feet in order to achieve bank stability and protect shoreline structures. According to the SMP, the City considers a 50-foot buffer to be the minimum necessary to provide for a 2.5:1 slope plus 20 feet, and imposes such 50 foot buffer on residential properties in the Residential Environment. For similar, adjacent nonleveed properties in the

Urban Conservancy Environment, the City presumes a 100-foot buffer is necessary to provide for a 2.5:1 slope plus 20 feet, and will only allow a reduction up to 50 feet if the buffer is resloped to a 2.5:1 slope with a 20-foot setback from the top of the slope.

Thus, while residential property owners benefit from a presumption in the SMP Update that a 50-foot buffer is sufficient to achieve a 2.5:1 slope plus 20 feet, commercial/industrial owners of nonleveed properties are not allowed a buffer reduction of up to 50 feet even if they can prove that the reduced buffer is sufficient to achieve a 2.5:1 slope plus 20 feet. Instead, the SMP Update requires commercial/industrial owners to actually reslope the bank, a very expensive and time consuming proposition given not just the cost to do so but also the federal, state and local permits required.

This is unfair and unreasonable. If the purpose of the buffer is to provide for sufficient area to allow for a more stable slope of 2.5:1 plus 20 feet, then commercial/industrial owners of nonleveed properties should be allowed, at the time of development or redevelopment of the property, to obtain a buffer reduction if it can demonstrate that there is sufficient area in a reduced buffer to allow for a 2.5:1 slope plus 20 feet and that such reduction would not otherwise adversely affect shoreline functions and values. And further, like residential property owners, they should be allowed to achieve up to a 50-foot buffer reduction if they can make that showing. Such a buffer reduction process for nonleveed properties is consistent with the rationale in the SMP Update for buffers for nonleveed properties.

The one-size-fits-all 100-foot buffer imposed on the Innkeeper's property by the SMP Update is neither justifiable nor reasonable, especially for narrow commercially or industrially zoned and developed riverfront properties with existing, fully functioning vegetative buffers and little room to redevelop landward of the buffer. The Innkeeper's property should either be subject to 50-foot buffer or provided with the flexibility to have its 100-foot buffer reduced to 50 feet if it can be accomplished without adversely affecting shoreline functions and values. If any wider buffers are imposed, the SMP should at least allow Innkeepers to obtain a reduction in the buffer upon a showing that the reduction would not adversely affect shoreline functions and values. Such flexibility in buffer width is needed particularly for narrow non-leveed commercially-developed property like the Residence Inn property, which is essentially cut in half by the 100-foot buffer. Such an approach would be consistent with the SMP goal of ensuring no net loss of shoreline functions and values.

To address these concerns, DOE should require the City to revise SMP Update §7.7(B) and TMC 18.44.050(A) to provide for a 50-foot buffer for non-leveed properties in the Urban Conservancy Environment. If a wider buffer is imposed, the buffer reduction provisions should be revised to eliminate the need to reslope the bank. Instead, the buffer reduction, and any

mitigation, should be based on the need to protect shoreline ecological functions and achieve no net loss of such functions.

Nonconforming Use and Structure Limitations

As indicated above, the 100-foot buffer in the SMP Update will cut through the middle of the existing hotel development, placing half of the buildings inside the buffer. Consequently, it would cause the current uses and improvements on the property to become nonconforming and make it virtually impossible to redevelop the existing hotel property to its current use or to any other commercially viable use currently allowed by the underlying zoning on the property.

While the SMP Update contains provisions that will allow non-conforming shoreline uses and structures to continue, with significant limitations, two critical concerns remain:

First, a developed commercial property like Innkeeper's will lose its legal, nonconforming status where the pre-existing use of all or a portion of a structure is changed to another use, even if the new use is permitted by the underlying zone. SMP Update §14.5(A)(4); TMC 18.44.130(E)(1)(d). This change of use limitation is particularly onerous on properties with existing leased commercial/industrial buildings that are nonconforming uses merely by virtue of the fact that the buildings are wholly or partially within the new shoreline buffer in the SMP Update. Many of these commercial and industrial structures along the river are set back from the river consistent with current buffer requirements in the SMP. Because these structures will now become nonconforming because of the new buffer requirements in the SMP Update, the new buffer requirements will now prohibit all of the commercial and industrial uses under which these structures were lawfully developed, uses that are and will remain permitted by the underlying zoning for these properties. Under these circumstances, if a new use is proposed for the existing buildings, even if that use is permitted by the underlying zoning, then the property loses its nonconforming status and any new use will have to comply with the SMP Update. In practical terms, this means that the building will have to be left vacant or removed. Such a result would have devastating impact on a property like the Residence Inn property, which has half of its existing buildings and improvements located within the new "no build" buffer imposed by the SMP Update.

Second, the only way for a property owner to obtain approval for a change of one non-conforming use to another, even if such changed use is allowed by the underlying zoning and could be little more than a change in tenants, involving no exterior alterations to the existing building or impact on shoreline functions and values, is to obtain a permit that would require the property owner to restore and/or enhance the entire shoreline buffer. SMP Update §14.6(A)(5); TMC 18.44.130(E)(1)(e). While it is appropriate to require the property owner to "offset the impact of the change of use per the vegetation management standards of this program," the

requirement to revegetate the entire shoreline goes far beyond any reasonable or proportional mitigating condition to ensure no net loss of shoreline functions.

These limitations on continuation of legal nonconforming uses and structures are inconsistent with RCW 90.58.020 and WAC 173-26-176(3)(c) and (h), WAC 173-26-186(5), WAC 173-26-186(8)(b)(i), WAC 173-26-191(1)(e), and WAC 173-26-201(2)(c) and (3) and could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wn.2d 740, 761, 49 P.3d 867 (2002) ("development conditions must be tied to a *specific, identified impact* of a development on the community."); RCW 82.02.020 (Exaction is unlawful tax or fee unless City meets burden of establishing that development conditions are reasonably necessary as a direct result of the proposed development); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App. 649, 187 P.3d 786 (2008) (King County's clearing limits in critical areas ordinance violate RCW 82.02.020 because not proportionally related to proposed development); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987) (City must show "essential nexus" between required condition and impact of development); *Dolan v. City of Tigard*, 512 U.S. 374, 386-94, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (City must make individualized determination the required condition is "roughly proportional" to the impacts of the proposed development).

To address these concerns, DOE should require the City to revise SMP Update §14.5 and TMC 18.44.100: (1) to allow a change of use from one nonconforming use to another for a structure wholly or partially within the shoreline buffer, so long as the use is permitted by the underlying zoning for the property and would not adversely affect shoreline functions and values; and (2) if any approval is required for a change of use, to only allow conditions reasonably necessary as a direct result of the change of use.

Vegetation Protection and Landscaping Standards

The SMP Update requires installation and maintenance of substantial, expensive revegetation and landscaping, both within and outside of the river buffer, including tree protection, retention and replacement requirements, landscaping requirements in river buffers, and landscaping and vegetation management requirements outside of the river buffer. SMP Update, §9.10 and TMC 18.44.080. These landscaping requirements apply to any development or redevelopment, regardless of its size or impacts to shoreline functions and values. While there is some relief from some of the river buffer landscaping requirements in SMP Update § 9.10(C) and TMC 18.44.080(C)(1)(a) for smaller projects, such relief does not extend to new development or full redevelopment of the site, which must landscape the entire site regardless of impacts, or to imposition of tree protection, retention and replacement requirements or

landscaping and vegetation management requirements outside of river buffers, which apply to any development or redevelopment, regardless of project size or shoreline impacts.

Imposing such revegetation and landscaping requirements without any consideration of the need for such requirements based on the impacts of development, or whether such required improvements are roughly proportional or reasonably necessary as a direct result of the project impacts, goes beyond ensuring no net loss of shoreline ecological functions, is inconsistent with RCW 90.58.020 and WAC 173-26-176(3)(h), WAC 173-26-186(5), WAC 173-26-186(8)(b)(1), and WAC 173-26-191(1)(e), and could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020 . *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wn.2d 740, 761, 49 P.3d 867 (2002) ("development conditions must be tied to a *specific, identified impact* of a development on the community."); RCW 82.02.020 (Exaction is unlawful tax or fee unless City meets burden of establishing that development conditions are reasonably necessary as a direct result of the proposed development); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App. 649, 187 P.3d 786 (2008) (King County's clearing limits in critical areas ordinance violate RCW 82.02.020 because not proportionally related to proposed development); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987) (City must show "essential nexus" between required condition and impact of development); *Dolan v. City of Tigard*, 512 U.S. 374, 386-94, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (City must make individualized determination the required condition is "roughly proportional" to the impacts of the proposed development). Further, they purport to impose development conditions to "relieve a preexisting deficiency," which is clearly unlawful. *Benchmark Land Co. v. City of Battleground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002).

To address these concerns, the DOE should revise Section 9.10 and TMC 18.44.080 to clarify that all vegetation protection and landscaping requirements therein will only be required to extent they are roughly proportional to or reasonably necessary as a direct result of impacts to shoreline functions and values from the proposed shoreline development.

Public Access Requirements

Like the vegetation protection and landscaping requirements, the public access requirements in SMP Update § 11 and TMC 18.44.100 require extensive and expensive public access improvements for relatively minor development or redevelopment. Thus, where an existing structure converts to a different use, where a building's floor area space increases by as little as 3,000 square or even where public access is simply identified on a Shoreline Public Access map, regardless of whether the proposed shoreline development will interfere with or create the need for public access, a property owner will be required to provide connections between the proposed development and the river's edge and between the public access site and the nearest street or other public area, and to either upgrade an existing trail along the entire

property frontage to meet the standards of a 14-foot wide trail with 2-foot shoulders on either side or dedicate an 18-foot-wide trail easement to the City for public access along the river if there is no existing trail.

While there is some relief from some of these public access requirements in SMP Update § 11.1 and 11.6 and TMC 18.44.100(A)(2) and (F), such relief does not appear to extend to the requirements in TMC 18.44.100(C) that require a property owner to either upgrade an existing trail along the entire property frontage to meet the standards of a 14-foot wide trail with 2-foot shoulders on either side or dedicate an 18-foot-wide trail easement to the City for public access along the river if there is no existing trail, regardless of whether the proposed use or development creates the need for such public access. The extent of these shoreline trail improvements that must be installed or dedicated does not appear to vary based on the need for such requirements to mitigate the impacts to public access from development, or whether such required improvements are roughly proportional to or reasonably necessary as a direct result of the project impacts.

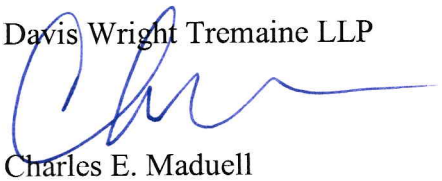
Requiring public access under these circumstances is inconsistent with RCW 90.58.020 and WAC 173-26-176(3)(h), WAC 173-26-186(5), WAC 173-26-186(8)(b)(1), WAC 173-26-191(1)(e), and WAC 173-26-221(4)(d)(iii)(A), and could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wn.2d 740, 761, 49 P.3d 867 (2002) ("development conditions must be tied to a *specific, identified impact* of a development on the community."); RCW 82.02.020 (Exaction is unlawful tax or fee unless City meets burden of establishing that development conditions are reasonably necessary as a direct result of the proposed development); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App. 649, 187 P.3d 786 (2008) (King County's clearing limits in critical areas ordinance violate RCW 82.02.020 because not proportionally related to proposed development); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987) (City must show "essential nexus" between required condition and impact of development); *Dolan v. City of Tigard*, 512 U.S. 374, 386-94, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (City must make individualized determination the required condition is "roughly proportional" to the impacts of the proposed development). Further, they purport to impose development conditions to "relieve a preexisting deficiency," which is clearly unlawful. *Benchmark Land Co. v. City of Battleground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002).

To address this concern, DOE should require the City to revise Section 11.1 of the SMP Update and TMC 18.44.100 to clarify that any shoreline trail improvements or dedications required by Section (C) will only be required to extent they are roughly proportional to or reasonably necessary as a direct result of the impacts from the proposed shoreline development.

Thank you for your consideration of these comments.

Very truly yours,

Davis Wright Tremaine LLP



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